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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1270~~ 88

DARWIN CHARLES BROWN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Darwin Charles Brown, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of conviction entered by the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinions of the district court on pre-trial motions, reported at 36 F.R.D. 204 and 36 F.R.D. 207 (D.D.C. 1964), are printed in Appendix B to this petition. (App. 1b to 7b). The opinion of the district court on post-trial motions, not reported, is printed in the appendix. (App. 8b-14b). The Court of Appeals affirmed without opinion; its judgment is printed in the appendix (App. 15b) as are the orders denying rehearing (App. 16b).

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1966. A timely petition for rehearing (or alternatively rehearing *en banc*) was denied on February 15, 1967. On March 5, 1967, Justice Brennan entered an order extending the time for filing a petition for certiorari to and including April 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment is sufficient if the only evidence before the Grand Jury is the hearsay testimony of a government agent and the transcripts of testimony before a prior grand jury? And, if not, whether the trial court must examine the grand jury minutes to determine the indictment's sufficiency?

2. Whether, consistent with the right of an accused to be indicted by a Grand Jury, the government may utilize a Bill of Particulars to name as co-conspirators three persons whom the Grand Jury deliberately excluded from the conspiracy charged?

3. Whether the trial court must instruct the jury concerning the number of conspiracies and schemes proved when the prosecution asserts the existence of a single conspiracy and scheme but the proof at trial supports a finding of separate agreements between different persons over different periods of time?

4. Whether an accused is deprived of a fair trial when the single offense with which he is charged is fragmented into ten separate counts in the indictment?

5. Whether, consistent with the standards required in federal prosecutions, a prosecutor may elicit testimony on direct examination totally inconsistent with the witnesses' pre-trial testimony to government investigators and then after the witnesses on cross-examination have recanted their direct examination, rely in summation solely on such repudiated direct testimony?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . ."

The pertinent text of Title 15 U.S.C. § 77q(a) and 18 U.S.C. § 371 is set forth in Appendix A to this petition (App. 1a).

STATEMENT

Petitioner, Darwin Charles Brown, a member of the Bar of California for twenty-eight years, was acquitted on five and convicted upon six of eleven counts on which he had been indicted, charging violations of the Securities and Exchange Act of 1933, 15 U.S.C. § 77q (a), and conspiracy under 18 U.S.C. § 371. The verdict followed a four-week jury trial in the United States District Court for the District of Columbia. Petitioner was sentenced to four months to one year and a day's imprisonment on each count, the sentences to run concurrently, and to a fine of $5,000 on the conspiracy count. With the exception of the fine, the sentence was suspended.

Between 1959 and 1961, the period covered by the indictment, petitioner had an active law practice (Tr. 2563-69),[1] specializing in Securities and Exchange Commission and corporate matters. The present indictment, which superseded and consolidated the two separate indictments originally returned by the first grand jury which considered this case, was voted in a single day by a second grand jury which had available to it transcripts from the prior grand jury and heard testimony from one witness. (See pp. 7-9, *infra*.) The present indictment contains eleven counts, each of which names petitioner, M. Thomas Kent and Ralph Whitmore as defendants. The first nine counts charge participation in a fraudulent scheme in the offer and sale of the stock of Inter-American Timber Corpora-

[1] All Tr. references, unless otherwise indicated, are to the trial transcript. As no full printed appendix was filed in the Court of Appeals below, the original transcript has been filed in the Supreme Court.

tion, an American corporation engaged in the development and exploitation of timber properties in Surinam. Count ten charges a similar scheme in connection with the offer and sale of stock of Venezuela Mines, Inc., an American corporation founded to develop mineral concessions in Venezuela. Count eleven charges a conspiracy to defraud in connection with the sale of stock in both corporations.

Inter-American Timber Corporation

In 1959, petitioner was counsel to George Stanford, a broker-dealer (Tr. 617). Ralph Whitmore, who worked for Stanford as a securities salesman, told his employer that a company headed by one Joseph Harris held rights to large tracts of timber in Surinam and that Harris desired to obtain financing to develop them. (Tr. 23, 24, 304). Harris furnished Whitmore and Stanford a brochure outlining his company's holdings, including 125,000 acres of timber under concession or in reserve (Tr. 309-310). Stanford then sought petitioner's legal advice in connection with the proposed financing. (Tr. 620). Between December 30, 1959, and April 15, 1960, Whitmore sold to three persons a total of $12,500 worth of pre-incorporated shares of Inter-American Timber Company at $1 a share. (Tr. 352, 537-39, 727, 1441-42).

Petitioner, with Harris' assistance, prepared three virtually identical versions of a written proposal for use in connection with negotiations to obtain financing for the project. (Tr. 1151, 1196-97). The government's allegations of fraud were premised largely on the statement in these brochures that 125,000 acres of timber was available if financing were obtained, and that this timber was worth over $9 million. (App.

24c.) When the negotiations to obtain financing proved fruitless, the project was abandoned and by June 1960, the company was dormant. (Tr. 2644-46). For petitioner's services in this connection, his law firm received a fee of $2,500, together with 100,000 shares of Inter-American stock which were never sold. *(Id.)*

Venezuela Mines, Inc.

In 1954, M. Thomas Kent met and worked with one Robert Taube who held diamond and gold concessions along Venezuelan rivers. (*See, e.g.,* Tr. 1886, 2067-70). Early attempts to obtain financing for the development of these properties failed, but further explorations by a co-owner and geologist, James P. Hea, led to reactivation of the project in 1960. (Tr. 2083-84). After Kent, Hea and Taube met in New York with one Russell Bryan, a consulting mining engineer (Tr. 1734), Kent retained petitioner to act as counsel for a company to be formed to secure the needed funds. The Company was incorporated in August, 1960. (Tr. 2644, 2648-49).

Whitmore agreed to attempt to raise capital for the venture, and ultimately secured a single $5,000 capital contribution from one investor. (Tr. 467). In December 1960, at a meeting in Caracas, Taube's mineral concessions were merged into the American corporation, in return for stock. (See *e.g.,* Tr. 485, 976, 1927, 2659-61).

When the necessary additional financing for the project could not be obtained, however, the company became dormant. In addition to his net $750 fee from Kent and Taube, petitioner's law firm received 250,000 shares of Venezuela Mines stock, none of which was ever sold. (Tr. 2664).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' affirmance of the trial court's refusal to inspect *in camera* the minutes of the grand jury which indicted petitioner stretches to its limits the rule that federal courts need not look behind an indictment which is, on its face, valid. *United States* v. *Costello,* 350 U.S. 359 (1956). The *Costello* rule relied on by the government in opposing petitioner's inspection motion, (Official Transcript of proceedings, *Motions,* Nov. 6, 1964 at 5) and by the trial court in denying it (App. 9b), is now under reconsideration by this Court in *Umans* v. *United States,* No. 967 (*cert. granted* 35 U.S. L. Week 3303 (Feb. 28, 1967)). Petitioner sought inspection of the grand jury minutes here to determine whether there was, in fact, *any* evidence considered by the grand jury other than a hearsay summary by a Government agent. In light of this Court's reconsideration of *Costello,* these facts raise an important issue: what showing of insufficiency of evidence must be made in order to obtain an inspection of the grand jury minutes?

This case had a peculiar genesis. In early March, 1964, Indictment No. 208-64 charged petitioner and Ralph Whitmore with conspiracy and nine counts of fraud (15 U.S.C. § 77q(a)) arising from the sale of Inter-American Timber securities. Later the same month, indictment No. 228-64 charged petitioner, Whitmore and M. Thomas Kent with conspiracy and one count of fraud (15 U.S.C. § 77q(a)) involving the sale of Venezuela Mines securities. Both indictments were returned by the same grand jury, under the aegis of the same prosecutor, and after hearing extensive testimony. In August 1964, the indictment from which this petition arises, No. 785-64, was returned by a *dif-*

ferent grand jury, presided over by a *different* prosecutor, and was presented after only one day of consideration and after petitioner's trial counsel had noted his objection to consolidation of the two original indictments for a single trial. (Official Transcript of Proceedings, November 6, 1964, *Motions,* pp. 6-7). At the hearing on petitioner's inspection motion, the prosecutor revealed that transcripts of the testimony before the prior grand jury were in the room with the second grand jury and that only one live witness had testified. (*Id.* at 16). While that witness was never identified, the government, in the opportunities given it, (Official Transcript of Proceedings Nov. 6, 1964, *Motions,* at 15-16, and Government-Appellee's Brief on Appeal, No. 19,460, at 50), has never denied that it was a government attorney or investigator.

Although the Motions Court disapproved ". . . the practice of presenting transcripts of testimony before one grand jury to another grand jury . . ." (Official Transcript of Proceedings, November 6, 1964, *Motions,* p. 16) it denied petitioner's motion for inspection. This ruling served to encourage the Government's practice of disregarding the grand jury's historic function "as a primary security to the innocent against hasty, malicious and oppressive prosecution," (*Wood* v. *Georgia,* 370 U.S. 375, 390 (1962)), viewing it instead, as simply an extension of the United States Attorney's Office.[2] The superseding indictment (No. 785-64), did

[2] This trend is clearly revealed, for example, in *United States* v. *Borelli,* 336 F. 2d 376 (2d Cir. 1964), and *United States* v. *Heap,* 345 F. 2d 170 (2d Cir. 1965). *See:* the analysis in Petition for Certiorari, *Umans* v. *United States,* No. 967 (October Term, 1966), pp. 8-10.

nothing more than combine the two earlier indictments, Nos. 208-64 and 228-64,[3] and in doing so, even carried forward into Overt Act 18 of the instant indictment the following misprint:

> "18. On or about March 25, 1961, the defendant Darwin Charles Brown mailed and caused to be mailed a letter . . . to Mr. Weston Bouret, Utah Construction & Mining Co., 550 California Street, *San Francisco 4, San Francisco (sic).*" (Emphasis supplied, App. 37c.)

The identical language, including "San Francisco 4, San Francisco," had been used to charge the commission of an overt act under indictment No. 228-64. (App. 20c.)

The Fifth Amendment provides that a defendant is entitled to the full protection of grand jury procedures before he can be brought to trial. This includes the guarantee that it act ". . . independently of either prosecuting attorney or judge." *Stirone* v. *United States,* 361 U.S. 212, 218 (1960). There is enough in this record to infer that the re-indictment was nothing more than a summary by the Government of the evidence before the first grand jury, a summary so cursory that even typographical errors went uncorrected. A new grand jury should have considered the case *de novo.*

The Court of Appeals for the District of Columbia strongly implied many years ago that a new indictment may not be returned without hearing witnesses. *Nordlinger* v. *United States,* 24 App. D.C. 406 (1904). Even the Second Circuit's opinion in *United States* v. *Umans,* 368 F. 2d 725 (1966), *cert. granted,* 35 U.S.L.

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[3] All three indictments are reproduced in Appendix C, No. 208-64 at App. 1c-14c, No. 228-64 at App. 15c-20c and the superseding No. 785-64 at App. 21c-37c.

Week 3303 (Feb. 28, 1967), which found no error in the trial judge's refusal to inspect the grand jury minutes, observes:

> ". . . we think it not amiss for us to state that excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecution that grand juries are supposed to afford to the innocent." 368 F. 2d at 730.

Other courts have held that, while it may not be improper for Government counsel to summarize "for the benefit of the grand jury *the evidence that has been heard,*" (*United States* v. *United States District Court for the Southern District of West Virginia,* 238 F. 2d 713, 721 (4th Cir. 1956), *cert. denied sub nom Valley Bell Dairy Co., Inc.* v. *United States,* 352 U.S. 981 (1957) (emphasis supplied)), it is decidedly improper for Government counsel to summarize evidence which has *not* been heard. The Massachusetts Supreme Court has stated, for example:

> "For the District Attorney to make such statement is to substitute his memory for recollection of the grand jurors and is to that extent to usurp their function." *Attorney General* v. *Pelletier,* 240 Mass. 264, 310, 134 N.E. 407, 420 (1922). *Accord: Abbott* v. *Circuit Court of Pima County,* 86 Ariz. 309, 313, 345 P. 2d 776, 778 (1959).[4]

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[4] Prosecutors, as representatives of a party to the proceedings, can hardly hope to be impartial during the grand jury's deliberations. See: *Prosecutor's Bias—An Occupational Disease,* 2 Ala. L. Rev. 40 (1958); Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case,* 54 Colum. L. Rev. 946 (1954); and 62 Harv. L. Rev. 1234, 1235 (1949), quoted with approval in *The Grand Jury,* 30 U. Kan. City L. Rev. 149, 183, n. 166 (1962).

No compelling considerations exist here to maintain grand jury secrecy. The standards of *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959) and *Dennis* v. *United States,* 384 U.S. 855 (1966), are clearly met by the existing strong suggestions apparent in this record that the Grand Jury which indicted the petitioner was far from independent or unbiased, but was rather little more than the ever-lengthening arm of the prosecutor's office.

2. The petitioner was further deprived of his constitutional right to be tried on an indictment of a grand jury because the government's bill of particulars and its proof at trial asserted the existence of a conspiracy which the grand jury deliberately failed to charge. Because the usual federal conspiracy charge is that the defendants conspired "with persons unknown," and because the government can and usually does particularize in its bill these "persons unknown", this Court should decide when such particularization becomes an impermissible amendment of the conspiracy count of an indictment, and when proof at trial, based on these particulars, results in a prejudicial variance from the charges returned by the Grand Jury. For, when an improper amendment occurs, the trial court is deprived of jurisdiction over the conspiracy charged (*Ex parte Bain,* 121 U.S. 1, 13 (1887), and *Russell* v. *United States,* 369 U.S. 749, 770-72 (1962)), and any conviction obtained must be reversed.

The superseding indictment, like its predecessors, charged that the petitioner, Whitmore and Kent conspired together and *only* ". . . with other persons to the Grand Jury *unknown* . . ." (emphasis supplied) to violate 15 U.S.C. § 77q(a). (App. 34c.) The government purported to identify these persons "unknown"

by naming in its bill of particulars three additional co-conspirators: Joseph Harris, owner of the Surinam timber concessions, and Robert L. Taube and James P. Hea, owners of the diamond and gold properties in Venezuela. Not one of these three was charged by either grand jury which considered this case. All three were known to both grand juries.[5]

If either grand jury had wanted to charge the petitioner with engaging in a conspiracy which included Hea, Taube, and Harris, two devices were available: the three men could have been named specifically as co-conspirators, indicted or unindicted, or the indictment could have asserted that petitioner, Whitmore and Kent conspired together and with "other persons to the Grand Jury *known* and unknown." The fact that neither device was used can only be construed as a deliberate decision by the grand jury to exclude Harris, Taube and Hea from the conspiracy charged.

The alteration of the Grand Jury's charges enabled the Government to bind petitioner by the statements, admissions and deeds of these three men. Petitioner thus not only found himself standing trial on a conspiracy charge essentially different from that alleged by the Grand Jury but also became bound by some of the most damning acts and admissions introduced into evidence: those of Harris.

When Harris testified, the jury was made aware that he was an alleged co-conspirator of the petitioner. (Tr.

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[5] Taube is specifically mentioned in Overt Act 12 of the Indictment, and petitioner's own grand jury testimony reveals extensive testimony concerning Harris (see, *e.g.*, Vol. 1, pp. 42-44, 59, 63, 65-66; Vol. II, pp. 48-49, 62-65), and Hea (see, *e.g.*, Vol. II, pp. 10-11, 13, 19, 33-35) as well as Taube (see, *e.g.*, Vol. II, pp. 4-6, 10, 17-20).

1323, 3247). Moreover, Harris admitted that a fatal telegram he sent out concerning millions of dollars of orders for cut timber was false (Tr. 837). The prosecutor spoke of Harris' statements as "admissions," (Tr. 3112) and, in enumerating those persons who had knowledge of the telegram's falsity, listed "*Harris,* Whitmore, Brown and Kent." (Tr. 3123, emphasis supplied.)

To uphold a conviction based on charges not asserted in the indictment emasculates the Fifth Amendment guarantee of indictment by a grand jury. No court may make such a change. Thus, in *Ex Parte Bain,* 121 U.S. 1 (1887), this Court found that the trial judge's action in striking certain words from the indictment resulted in trial and conviction on charges essentially different from those returned by the grand jury, and reversed Bain's conviction. In *Stirone* v. *United States,* 361 U.S. 212 (1960), the trial court's charge to the jury was found to have effected an amendment to the indictment, and again the conviction was struck down.

It is equally clear that the Government may not use a bill of particulars to amend or to shore up a defective indictment. *United States* v. *Comyns,* 248 U.S. 349 (1919), holds that a bill of particulars cannot be considered in determining whether an indictment is valid. *Accord: United States* v. *Smith,* 16 F.R.D. 372, 374 (W.D. Mo. 1954) (Opinion by Justice Whittaker); *United States* v. *Spector,* 326 F. 2d 345, 347 (7th Cir. 1963). The rule of *Russell* v. *United States, supra,* is that an unconstitutionally vague indictment cannot be cured by a bill of particulars:

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of

> the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. *For a defendant could then be convicted on the basis of facts not found by . . . the grand jury which indicted him.*" 369 U.S. at 770. (Emphasis supplied.)

The danger feared by the *Russell* court was realized in petitioner's trial below: he was convicted of involvement in a conspiracy on the basis of facts specifically rejected by the grand jury which indicted him.

Recently two circuits have warned against non-grand jury amendments of indictments. In *United States* v. *Critchley,* 353 F. 2d 358 (3rd Cir. 1965), a conviction was reversed because, *inter alia,* trial proof of the time the offenses were allegedly committed centered around dates set forth only in the bill of particulars. The Third Circuit pointed out that a bill of particulars:

> ". . . can neither add to nor subtract from the indictment nor change the crime charged. [Citing cases.] To allow the Government to prove threats made prior to the dates listed in the indictment on the strength of a bill of particulars would be tantamount to permitting the indictment to be amended by the bill. An indictment may not be amended except by resubmission to the grand jury." *Id.* at 362.

The appeal in *Marsh* v. *United States,* 344 F. 2d 317 (5th Cir. 1965), centered around the defendant's claim that the trial court's action in striking the words "and other . . ." from the indictment constituted an impermissible amendment. Although the Fifth Circuit up-

held the trial judge's action, Judge Rives, speaking for the Court, took the opportunity to point out:

> "In the present case, if, instead of striking the words 'and other,' the amendment had added those words so as to *increase* the number of offenses charged, clearly the amendment would be prejudicial to the defendants and not 'merely a matter of form.'" *Id.* at 322 (Emphasis supplied).

Petitioner sustained such prejudice.

3. Because of proof at trial and the peculiar origin of the indictment here, (see pp. 7-9, *supra*), petitioner, relying on *Kotteakos* v. *United States,* 328 U.S. 750 (1946), requested the trial judge to permit the jury to decide whether the evidence supported the charge that he was engaged in a single conspiracy and a single scheme to defraud. (Tr. 3315) The refusal of these requests is contrary to this Court's ruling in *Kotteakos,* and presents the vital question of how this ruling is to be implemented in a trial court's jury instructions.

The original indictments returned in this case, Nos. 208-64 and 228-64, charged separate conspiracies and separate schemes to defraud: one conspiracy and scheme in connection with Inter-American Timber Corporation; one, in connection with Venezuela Mines, Inc. (App. 1c-20c.) The second grand jury, however, after hasty deliberation, (*See:* p. 8, *supra*) made an essentially different charge: a single scheme, a single encompassing conspiracy.

Proof at trial supported a finding of separate ventures, at widely separate locations, during separate periods of time, conducted by different groups of persons. The Inter-American project was operational between December 1959 and June 1960, and was located

in Surinam. (See, *e.g.*, Tr. 727, 2635, 2644-46). The Venezuela Mines promotion in Venezuela on the other hand, did not get under way until the company was incorporated in August, 1960, funds were not sought until October, 1960, and the underlying mineral concessions were not acquired until December 1960 (See, *e.g.*, Tr. 485, 964-65, 976, 2644). Moreover, while the bill of particulars charged that Harris, Taube, and Hea were co-conspirators in the single conspiracy alleged, the evidence adduced at trial failed to show any connection between Harris and the Venezuela Mines venture, or between Hea and Taube and the Inter-American project. Clearly these three men could have been parts only of separate operations, involving separate corporations.

Kotteakos, supra, holds that where an indictment charges one conspiracy, but proof at trial fails to show a unitary agreement or conspiracy among all defendants and co-conspirators, separate trials of each separate conspiracy or agreement shown are required. The *Kotteakos* ruling, although involving eight separate conspiracies tied together through a single man, has been applied even where the variance between proof and charge involved only two conspiracies. *United States* v. *Russano,* 257 F. 2d (2d Cir. 1958); *United States* v. *Agueci,* 310 F. 2d 817 (2d Cir. 1962); *Canella* v. *United States,* 157 F. 2d 470 (9th Cir. 1946); *Daily* v. *United States,* 282 F. 2d 818 (9th Cir. 1960); *Rocha* v. *United States,* 288 F. 2d 545 (9th Cir. 1961). Petitioner repeatedly sought separate trials for the separate agreements charged: he refused to consent to consolidation of the two original indictments (Official Transcript of Proceedings, *Motions,* November 6, 1964, pp. 6-7); and moved to sever the Inter-American charges from those involving Venezuela Mines both before (Motion of October 14, 1964) and during trial.

(Tr. 129-130). Even assuming that petitioner was not entitled to a severance of counts, he was, at the least, entitled to have the jury consider the number of agreements and schemes shown by the evidence. As the Second Circuit has stated: "[w]hether a scheme is one conspiracy or several is primarily a jury question, since it is a question of fact as to the nature of the agreement." *United States* v. *Crosby*, 294 F. 2d 928, 945 (2d Cir. 1961). As petitioner's requested instructions on this point were not given, (Tr. 3315) and as the Court's charge made it abundantly clear that only one agreement and conspiracy was being asserted, (Tr. 3282-84, 3300-3304), petitioner was denied a jury trial on this essential fact.

4. The trial court's action in denying petitioner's motion to consolidate the indictment's ten substantive "scheme" counts into a single count was affirmed by the Court of Appeals. (App. 7b, 13b, 15b.) If this ruling is followed in the District of Columbia, and there is no reason to believe it will not be,[6] a defendant brought to trial for securities fraud will be forced to go to trial on a multicount indictment which, however, charges only one unlawful course of conduct.[7] De-

[6] The indictment in *United States* v. *Gaston*, Criminal No. 722-64, United States District Court for the District of Columbia (37 F.R.D. 476 (D.D.C. 1965), charged 75 substantive counts, 31 of which alleged violations of 15 U.S.C. § 77q(a). The indictment in *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965), contained twenty counts, one conspiracy in violation of 18 U.S.C. § 371, and 19 "scheme" counts in violation of 15 U.S.C. § 77q(a).

[7] The fragmented approach to a § 77q(a) indictment is also the rule in the Tenth Circuit, *Palmer* v. *United States*, 229 F. 2d 861, 867 (10th Cir. 1955). In denying petitioner's pre-trial motion to consolidate counts, Judge Holtzoff pointed out the conflict between the Second and Tenth Circuits and chose to follow the ruling of the latter. *United States* v. *Brown*, 36 F.R.D. 207, 208 (1964). (App. 7b.)

fendants facing identical charges in the Second Circuit, on the other hand, are entitled to have separate substantive charges consolidated into a single count. *United States* v. *Hughes,* 195 F. Supp. 795 (S.D. N.Y. 1961); *United States* v. *Greenberg,* 30 F.R.D. 164 (S.D.N.Y. 1962); and *United States* v. *Cashin,* 281 F. 2d 669 (2d Cir. 1960). The multi-count indictment, of course, promotes compromise verdicts, as is clearly shown by petitioner's acquittal on five of the ten substantive counts charged here. (*See:* p. 4, *infra.*)

This Court has never ruled upon the validity of multiple substantive counts in a securities fraud case. The validity of such an indictment in mail fraud cases has been sustained because that statute, 18 U.S.C. § 1342, makes it clear that the "mailing," rather than the "scheme" is the gist of the offense. *United States* v. *Cashin, supra.* That § 77q(a) is not equally clear is amply demonstrated by the divergent approaches to it taken by the Second, Tenth, and District of Columbia Circuits.

Petitioner's right to a fair and just determination of his guilt or innocence entitled him to be charged with a single course of conduct in a single count of the indictment. *Universal CIT Credit Corp.,* 344 U.S. 218 (1952). Refusal by the Courts below to consolidate the substantive counts was predicated upon a misconception of the essence of a § 77q(a) offense. What, in fact, constitutes the gist of a § 77q(a) offense is the heart of the conflict between the circuits on this point.

5. The tactic of relying in summation on the repudiated direct testimony of key government witnesses is in direct conflict with the standards for prosecutorial conduct laid down by this Court in *Brady* v. *Maryland,* 373 U.S. 83 (1963), and *Berger* v. *United States,* 295 U.S. 78 (1935). The practice was particularly odious

here because the recantations ignored by the prosecutor were in total accord with statements given by the witnesses to government investigators prior to trial.

When George Stanford (the stockbroker who originally promoted the Inter-American venture) appeared before the S.E.C. on July 23, 1962, he testified that he never talked with the defendant Kent concerning Inter-American. (Tr. 685). At trial, however, on direct examination, Stanford testified that it was Kent who had first brought him the Inter-American project. (Tr. 618-19). On being shown his S.E.C. statements by defense counsel during cross-examination, Stanford labeled his direct testimony on this matter "erroneous." (Tr. 689). In summation, the prosecutor charged Kent with bringing the lumber scheme "to Stanford's attention." (Tr. 3107).[8]

In 1963, Harris, (President of the Surinam Timber Company which sold timber rights to the Inter-American group), testified before the S.E.C. that when he met with petitioner in Florida in February 1960, he had 25,000 acres of timber concessions, an additional 100,000 acres in reserves, and that he so informed petitioner. (Tr. 1100-01). Harris' direct testimony at trial, on the other hand, was that he had no timber concessions whatsoever during this period and that petitioner knew this at the February meeting in Florida. (Tr. 812-13, 826-27.) On cross-examination, Harris admitted his testimony before the S.E.C. (Tr. 1101) and re-affirmed that, in February, 1960, he held not only

[8] The prosecutor needed to show Kent's involvement in Inter-American, although the original indictments returned did not connect him with it, in order to support the government's contention that there was only one conspiracy. (*Cf.*: the two original conspiracies charged, App. 12c, ff., and 18c, ff., with the superseding, combined conspiracy count, App. 34c, ff.

the acreage referred to (Tr. 1270, 1279), but also a 37-acre lumber mill site. (Tr. 1293). The prosecutor summed up Harris's testimony by stating:

> ". . . in February [petitioner] had been in Miami . . . he knew at that time . . . Harris . . did not have the concessions . . ." (Tr. 3123).[9]

Russell R. Bryan, (a mining engineer who was consulted in connection with Venezuela Mines, Inc.), testified before the S.E.C. on September 17, 1962, that, in his discussions with Taube and Kent there had been no direct mention of the sale of securities. (Tr. 1731). But Bryan's testimony at trial, on both direct and redirect examination, described lengthy discussions concerning accounting practices used to evaluate mineral reserves "if stock were to be sold publicly in the United States. . ." (*See, e.g.,* Tr. 1727, 1703). On re-cross examination, Bryan admitted giving the original testimony before the S.E.C. and reiterated its truth. (Tr. 1729-31.) The prosecutor's summary of Bryan's testimony relied solely on his discredited direct testimony that he had warned Kent concerning the standards applicable to S.E.C. registrations and public sales of securities. (Tr. 3102.)[10]

No jury could avoid being confused and misled by this web of contradictions. No defendant could expect to obtain a fair determination of his guilt or innocence in the midst of it.

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[9] The key representation the indictment alleged to be fraudulent was the assertion that the Inter-American group had a right to 125,000 acres of timber concessions in Surinam. (App. 24c).

[10] The accounting method used to evaluate mineral reserves was alleged to be a central fraudulent representation in connection with the Venezuela Mines venture. (App. 24c).

The United States Attorney has always been held to an especially high standard. *Berger* v. *United States, supra.* He must not become an "architect of a proceeding that does not comport with standards of justice." *Brady* v. *Maryland,* 373 U.S. 83, 88 (1963). *See also: Napue* v. *Illinois,* 360 U.S. 264 (1959); and *United States* v. *Spangelet,* 258 F. 2d 338 (2d Cir. 1958). These high standards should preclude a prosecutor in a federal criminal case from summing up the proof of key issues by relying exclusively on the disavowed and repudiated direct testimony of government witnesses. As the First Circuit has held:

> "... it is not only short-sighted, but improper, for the Government to argue its witness' direct testimony in disregard of obvious modifications and explanations made on cross." *Reiss* v. *United States,* 324 F. 2d 680, 685-86 (1st Cir. 1963).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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